Office - Supreme Court, U. S.
FILED
DEC 31 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 780

ELVA MAE REELEY, WIDOW, AND ON BEHALF OF THE THREE INFANT CHILDREN OF THE LATE GEORGE A. REELEY, DECEASED,

Petitioner,

against

THE PENNSYLVANIA RAILROAD COMPANY,
EMPLOYER AND SELF-INSURER.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND, AND BRIEF IN SUPPORT THEREOF.

ISAAC LOBE STRAUS,
Munsey Building,
Baltimore, Maryland,
Counsel for Petitioner.

AVRUM K. RIFMAN,
Munsey Building,
Baltimore, Maryland,
Of Counsel.

The Daily Record Co. Print, Baltimore.

SUBJECT INDEX.

PAGE

Petition for writ of certiorari 1

A. Statement of the matter involved 1

B. Jurisdictional statement 11

C. The questions presented 12

D. Reasons relied on for the allowance of the writ 14

Brief in support of Petition for Writ of Certiorari 19

I. Opinions below 19

II. Jurisdiction 19

III. Statement of the case 20

IV. Specification of errors 20

V. Argument 23

Summary of Argument 23

Point 1 28

Point 2 34

Point 3 39

Point 4 43

Point 5 50

Conclusion 57

TABLE OF CASES CITED.

Balto. & Ohio C. T. R. Co. v. *Industrial Commission*, 366 Ill. 223, 8 N. E. (2) 642 34

Balto. & Ohio S. W. R. Co. v. *Burtch*, 263 U. S. 540 43

Baughman v. *Grand Trunk Western R. Co.*, 271 Mich. 244, 259 N. W. 897 52

Berry v. *St. Louis & S. F. Ry. Co.*, 324 Mo. 775, 26 S. W. (2) 988, cert. den. 281 U. S. 765 43

Boston & M. R. Co. v. *Armburg*, 285 U. S. 234 48

Chicago, B. & Q. R. R. Co. v. *Harrington*, 241 U. S. 177 ..... 31, 56

Chicago & E. I. R. Co. v. *Industrial Commission*, 284 U. S. 296 ..... 34, 56

Chicago Junction Ry. Co. v. *Industrial Board*, 277 Ill. 512, 115 N. E. 647 52

Chicago & N. W. Ry. Co. v. *Bolle*, 284 U. S. 74 ..... 33, 55, 56

Chicago, R. I. & P. Ry. Co. v. *Devine*, 239 U. S. 52 12

Colangelo v. *Pittsburgh & L. E. R. Co.*, 336 Pa. 490, 9 A. (2) 391 35

Cox v. *Missouri Pac. R. Co.*, 332 Mo. 991, 61 S. W. (2) 962 46

Delaware L. & W. R. Co. v. *Peck*, 225 F. 261 (C. C. A.) 50

PAGE

Erie R. R. Co. v. *Collins*, 253 U. S. 77 56
Erie R. R. Co. v. *Szary*, 253 U. S. 86 56
Erie Railroad Co. v. *Welsh*, 242 U. S. 303 ..... 32, 41
Flack v. *Delaware, L. & W. Co.*, 45 F. (2) 683 (C. C. A. 2) 43
Geraghty v. *Lehigh Valley R. Co.*, 70 F. (2) 300 (C. C. A. 2), 11 F. Supp. 378 (D. C. N. Y.), 83 F. (2) 738 (C. C. A. 2) 50
Gidley v. *Chicago Short Line Ry. Co.*, 346 Ill. 122, 178 N. E. 399, cert. den. 285 U. S. 554 35
Grigsby v. *Southern Ry. Co.*, 3 F. (2) 988 (C. C. A. 6), cert. den. 268 U. S. 704 45
Gunning v. *Cooley*, 281 U. S. 90 ..... 36, 40
Heffner v. *Pennsylvania R. Co.*, 81 F. (2) 28 (C. C. A. 2) 52
Howard v. *Mobile & O. R. Co.*, 335 Mo. 295, 73 S. W. (2) 272 43
Illinois Cent. R. R. Co. v. *Behrens*, 233 U. S. 473 ..... 31, 41
Illinois Cent. R. R. Co. v. *Peery*, 242 U. S. 292 ..... 33, 41, 43
Industrial Accident Comm. v. *Davis*, 259 U. S. 182 ..... 12, 34, 49
Jarvis v. *Chicago, B. & Q. R. Co.*, 327 Mo. 428, 37 S. W. (2) 602, cert. den. 284 U. S. 635 52
Kinzell v. *Chicago, M. & St. P. Ry. Co.*, 250 U. S. 130 12
Konsoute v. *Pennsylvania Railroad Co.*, 287 Pa. 302, 135 A. 209, cert. den. 273 U. S. 747 34
Kraemer v. *Chicago & N. W. Ry. Co.*, 148 Minn. 310, 181 N. W. 847, 186 N. W. 392 52
LaLone v. *St. Louis M. B. T. Ry. Co.*, 316 Mo. 835, 293 S. W. 379, cert. den. 275 U. S. 524 43
Lavigne v. *Chicago, M. & St. P. R. Co.*, 287 Ill. App. 253, 4 N. E. (2) 785, and cases cited, cert. den. 302 U. S. 688 52
Lawrie v. *Atlantic City R. Co.*, 3 N. J. Misc. 267, 127 A. 818 50
Lehigh Valley Railroad Co. v. *Barlow*, 244 U. S. 183 ..... 41, 53
Louisville & N. R. Co. v. *Strange's Admx.*, 156 Ky. 439, 161 S. W. 239.. 50
Louisville & Nashville R. R. Co. v. *Parker*, 242 U. S. 13 42
Mayer v. *Union R. Co.*, 256 Pa. 474, 100 A. 967, cert. den. 243 U. S. 656. 50
Mayor v. *Central Vermont Ry. Co.*, 26 F. (2) 905, aff. 26 F. (2) 907 (C. C. A. 2), cert. den. 278 U. S. 624 49
McBain v. *Northern Pac. Ry. Co.*, 52 Mont. 578, 160 P. 654 52
McCoy v. *Southern Pac. Co.*, 29 Cal. A. 16, 83 P. (2) 970, cert. den. 307 U. S. 626 35
McDermott v. *Chicago & N. W. Ry. Co.*, 124 Neb. 727, 248 N. W. 59..... 50
Mease v. *Reading Co.*, 126 Pa. Super. 436, 191 A. 402, cert. den. 302 U. S. 705 46
Mellon v. *Weber*, 115 Oh. St. 91, 152 N. E. 753 43
Middleton v. *Southern Pac. Co.*, 61 F. (2) 929 (C. C. A. 5), cert. den. 289 U. S. 736 46
Minneapolis & St. Louis R. R. Co. v. *Winters*, 242 U. S. 353 ..... 34, 53
Mississippi Cent. R. Co. v. *Knight*, 138 Miss. 621, 103 So. 377, cert. den. 269 U. S. 559 50
Missouri Pac. R. Co. v. *Industrial Commission*, 348 Ill. 355, 180 N. E. 912 46
Mitchell v. *Louisville & N. R. Co.*, 305 Ill. A. 635, 27 N. E. (2) 861.... 35
Murray v. *Pittsburgh C., C. & St. L. R. Co.*, 263 Pa. 398, 107 Atl. 21.... 46
New York Cent. & H. R. R. Co. v. *Carr*, 238 U. S. 260 48

PAGE

New York Cent. R. Co. v. *Marcone*, 281 U. S. 345..... 42
New York Cent. R. R. Co. v. *White*, 243 U. S. 188..... 34
New York, N. H. & H. R. Co. v. *Bezue*, 284 U. S. 415..... 33, 48
North Carolina R. R. Co. v. *Zachary*, 232 U. S. 248..... 33, 36, 41
Osborne v. *Gray*, 241 U. S. 16..... 37
Painter v. *Balto. & O. R. Co.*, (Pa. 1940), 13 A. (2) 396, cert. den. Oct. Term, 1940..... 46
Palermo v. *Erie R. Co.*, 173 N. Y. Supp. 456, 185 App. Div. 656..... 43
Pedersen v. *Delaware, Lack. & West. R. R. Co.*, 229 U. S. 146..... 34, 43
Pennsylvania Co. v. *Donat*, 239 U. S. 50..... 43
Pennsylvania Railroad Co. v. *Stallings*, 165 Md. 615, 170 A. 163..... 35
Philadelphia & R. Ry. Co. v. *Berman*, 295 F. 658 (C. C. A. 3)..... 43
Phillips v. *Union Terminal Ry. Co.*, 328 Mo. 240, 40 S. W. (2) 1046, cert. den. 284 U. S. 660..... 36
Pope v. *Utah-Idaho Cent. R. Co.*, 54 F. (2) 575 (C. C. A. 10)..... 46
Raymond v. *Chicago, M. & St. P. Ry. Co.*, 243 U. S. 43..... 34
Red Cross Line v. *Atlantic Fruit Co.*, 264 U. S. 109..... 36
Reif v. *Schumacker, et al.*, (Cal. 1940), 102 P. (2) 375..... 35
Rice v. *Baltimore & O. R. Co.*, 42 F. (2) 387 (C. C. A. 6)..... 46
Richmond & Danville R. R. Co. v. *Powers*, 145 U. S. 43..... 40
Roberson v. *St. Louis M. B. T. Ry. Co.*, 201 Mo. App. 672, 213 S. W. 873. 43
Rogers v. *Canadian Nat. Ry. Co.*, 246 Mich. 399, 224 N. W. 429, cert. den. 280 U. S. 554..... 52
Russell v. *St. Louis, S. F. Ry. Co.*, 336 Mo. 845, 81 S. W. (2) 621..... 34
St. Louis & S. F. Ry. Co. v. *Fraser*, 75 Okla. 265, 183 P. 478..... 43
Schauffele v. *Director General*, 276 F. 115 (C. C. A. 3), cert. den. 257 U. S. 661..... 45
Seaboard Air Line Ry. v. *Koennecke*, 239 U. S. 352..... 43
Seaboard Air Line Ry. v. *Padgett*, 236 U. S. 668..... 12
Second Employers' Liability Cases, 223 U. S. 1..... 30, 45
Seyle v. *Charleston Terminal Co.*, 106 S. Car. 215, 90 S. E. 1016, 109 S. Car. 99, 95 S. E. 178..... 43
Shanks v. *Delaware, Lack. & West. R. R. Co.*, 239 U. S. 556..... 33, 56
Siegel v. *Missouri-K.-T. R. Co.*, 342 Mo. 130, 119 S. W. (2) 376, cert. den. 305 U. S. 654..... 46
Smith v. *Interurban Ry. Co.*, 186 Iowa 1045, 171 N. W. 134, cert. den. 251 U. S. 552..... 50
Smith v. *Salt Lake & U. R. R. Corp.* (Utah, 1940), 105 P. (2) 338..... 43
Southern Pac. Co. v. *Industrial Acci. Comm.*, 251 U. S. 259..... 12, 34
Southern Pac. Co. v. *Middleton*, 54 F. (2) 883 (C. C. A. 5)..... 45
Southern Pacific Co. v. *Schuyler*, 227 U. S. 601..... 36
Southern Railway Co. v. *Lloyd*, 239 U. S. 496..... 41
Spencer v. *Chicago & N. W. Ry. Co.*, 336 Ill. 560, 168 N. E. 686, cert. den. 281 U. S. 736..... 46
Texas & Pacific Ry. Co. v. *Cox*, 145 U. S. 593..... 36
Tipton v. *Atchison, T. & S. F. Ry. Co.*, 298 U. S. 141..... 36
Toledo, St. Louis & West. R. R. Co. v. *Slavin*, 236 U. S. 454..... 12
United States v. *Lowden*, 308 U. S. 225..... 47
Van Brimmer v. *Texas & P. Ry. Co.*, 190 F. 394 (D. C. Tex.)..... 46
Voelker v. *Delaware, L. & West. R. Co.*, 31 F. Supp. 387 (D. C. N. Y.).. 36

PAGE

Western & Atlantic R. R. v. *Hughes*, 278 U. S. 496..... 37
Wichita Falls & Southern R. R. Co. v. *Holbrook*, 125 Tex. 184, 78 S. W. (2) 938, cert. den. 296 U. S. 618..... 38
Wichita Falls & S. R. Co. v. *Lindley*, (Tex. 1940), 143 S. W. (2) 428.. 46
Winfree v. *Northern Pac. Ry. Co.*, 227 U. S. 296..... 46
Wise v. *Lehigh Valley R. Co.*, 43 F. (2) 692 (C. C. A. 2)..... 45

STATUTES CITED.

Federal Employers' Liability Act (U. S. C. Tit. 45, Sec. 51, et seq.). 3, 11, 20
Section 1 ..... 23, 28, 30, 32, 45
Amendment of August 11, 1939 (53 Stat. 1404)..... 46
Judicial Code, Section 237(b)..... 11, 19
Maryland Workmen's Compensation Act (Code of P. G. L. of Md., 1939, Article 101)..... 3, 11
Section 44..... 35
Section 70 3
Section 79 35

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No.....

ELVA MAE REELEY, WIDOW, AND ON BEHALF OF THE THREE INFANT CHILDREN OF THE LATE GEORGE A. REELEY, DECEASED,

Petitioner,

against

THE PENNSYLVANIA RAILROAD COMPANY,
EMPLOYER AND SELF-INSURER.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Elva Mae Reeley, widow, and on behalf of the three infant children of the late George A. Reeley, deceased, respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeals of Maryland rendered in the above cause on December 18, 1940.

A.

STATEMENT OF THE MATTER INVOLVED.

The Court of Appeals of Maryland, reversing without a new trial the judgment rendered on a verdict and specific findings of a jury that a deceased employee was, at the

time he received injuries resulting in his death, engaged in intrastate work to the extent that it was clearly separable and distinguishable from any interstate transportation in which he had previously been engaged, and that such interstate transportation had terminated prior to his being injured, held that the trial Court erred in allowing the jury to pass on the questions of fact involved in the determination of the status of the deceased employee at the time of his injuries, and that the trial Court should have instructed the jury that, as a matter of law, the uncontradicted evidence in the case showed that the deceased was engaged in interstate commerce at the time of his injuries and death. That there was an interstate movement of ore by train from Harrisburg, Pennsylvania, to the Canton ore piers in Baltimore, Maryland, and that deceased worked as brakeman on said train *previous* to the time of his injuries and death, is, as the trial Court plainly found and stated (R. 141), not disputed. As the jury found, however, and, we submit, as the evidence clearly shows, the interstate character of the work in which deceased had previously been engaged, and all of his interstate duties, had for all purposes ceased and terminated at the Canton yards prior to the time of his injuries, and at said time he was not engaged in interstate transportation or in work so closely related to it as to be practically a part of it but was, pursuant to detailed and specific orders of his employer, engaged in intrastate work clearly separable and distinguishable from his previous activities. Moreover, the instrumentalities, namely, the engine and tender, upon which deceased was in attendance had been, at the time of his injuries, so far as the evidence shows, completely withdrawn and retired from interstate transportation, and Respondent did not attempt to show any other, different or contemplated future use thereof, although all evidence on that subject was exclusively within Respondent's knowledge and power to adduce.

The cause originated when Petitioner, Elva Mae Reeley, widow of George A. Reeley, deceased, and mother of their

three infant children, all dependents of the deceased, sought compensation (R. 6, 9) for herself and said infant dependents pursuant to the provisions of the Maryland Workmen's Compensation Act (Code of P. G. L. of Md., 1939, Article 101) from The Pennsylvania Railroad Company, Respondent, his employer, for his death resulting from accidental personal injuries sustained by him arising out of and in the course of his said employment by Respondent as a brakeman. Respondent, a self-insurer (R. 9) conformably to other provisions of the Maryland Act, contested the claim and State jurisdiction by invoking, as exclusively controlling of the rights and liabilities of the parties and as determinative of the validity of the claim for compensation, the provisions of the Federal Employers' Liability Act of 1908 (35 Stat. 65; U. S. C. Tit. 45, Sec. 51, *et seq.*); and in furtherance of its defense under the Federal Act requested that the State Industrial Accident Commission of Maryland, before which body the matter initially came on for hearing, decide, as Respondent's issue (R. 9): "Whether or not George A. Reeley, deceased employee, was engaged in *interstate commerce* at the time of the alleged injury". The Commission held that it had no jurisdiction because deceased was engaged in interstate commerce, and found for Respondent on the issue thus presented, which was the sole issue decided by it, which resulted in the disallowance of the claim for compensation (R. 9).

Thereafter, as authorized by Section 70 of said Article 101 of the Maryland Code, Petitioner seasonably filed an appeal (R. 3) from the decision of the Commission to the Superior Court of Baltimore City and elected to have the questions of fact involved in the case submitted for determination by a jury. Proposed issues of fact of Petitioner (R. 3-4) and of Respondent (R. 4) were filed and, each opposing party having excepted to the other's proposed issues, the trial Court ruled (R. 5) that the cause be tried and submitted to the jury upon two issues of fact, Peti-

tioner's proposed issues Nos. 3 and 4, namely: "Was the decedent, George A. Reeley, at the time of the accidental personal injury resulting in his death, on the 21st day of November, 1937, engaged in intrastate work to the extent that it was clearly separable and distinguishable from his interstate work"; and "Did the employment of George A. Reeley, decedent, in interstate commerce as such, terminate when the cars were 'cut off' at the Canton yards on the 21st day of November, 1937, preceding his accidental personal injury and death". The case was tried before the Court and a jury upon the transcript of testimony taken before the Commission, additional testimony of witnesses, and exhibits.

Upon the conclusion of the evidence Respondent requested the trial Court to rule and to instruct the jury that, as a matter of law, the uncontradicted evidence in the case showed that the deceased was engaged in "interstate commerce" at the time of his death and the answers to the issues submitted should be in the negative, which request was by the trial Court refused (R. 146). Respondent then requested the trial Court to instruct the jury that the decision of the Commission was *prima facie* correct and that, therefore, Petitioner had the burden of proving that her husband, the deceased, was not engaged in interstate commerce, which request was by the trial Court granted (R. 144).

At the request of Petitioner the trial Court instructed the jury (R. 144-146) that if it found from the evidence that at the time Reeley sustained the accidental personal injuries resulting in his death he was engaged in intrastate work to the extent that it was clearly separable and distinguishable from his interstate work, then the answer of the jury to the first issue submitted to it should be in the affirmative; further, that if the jury found from the evidence that the employment of deceased, in interstate commerce as such, terminated when the sixty-two freight cars were cut off at the Canton yards on November 21,

1937, and thereafter the deceased sustained an accidental personal injury resulting in his death, and arising out of and in the course of his employment by Respondent, while engaged in intrastate work, then the answer of the jury to the second issue submitted to it should be in the affirmative; and, finally, that while the decision of the Commission was *prima facie* correct, yet if the jury was satisfied by a preponderance of the testimony that deceased sustained the accidental personal injuries resulting in his death, which arose out of and in the course and scope of his employment by Respondent, and that at the time deceased sustained said injuries he was not engaged in interstate transportation or in work so closely related to it as to be practically a part of it, then the answer of the jury to both issues submitted to it should be in the affirmative.

The verdict of the jury was an affirmative answer to each of the issues submitted to it, resulting in the reversal of the decision of the Commission (R. 5). Respondent moved for a new trial, which was denied, and judgment was entered for Petitioner (R. 5). Respondent then filed an appeal to the Court of Appeals of Maryland which, as stated, reversed without a new trial the findings of the jury and the judgment thereon of the Superior Court of Baltimore City, and held that the trial Court committed error in refusing Respondent's first or demurrer prayer (R. 146), which contained the request that the trial Court rule as a matter of law that deceased had been engaged in "interstate commerce" at the time of his death, and held, further, as a matter of law, that the remedy afforded by the Federal Employers' Liability Act was paramount and exclusive and that the Commission had no jurisdiction of the claim for compensation.

At the time of his death deceased was forty-five years of age, was a brakeman in the employ of Respondent (R. 6), and lived with his wife and infant children in Baltimore, Maryland. There were no eye witnesses to the accident causing the injuries to deceased that resulted in his death,

but it is clear from all the evidence adduced, and particularly from the nature and extent of his injuries as testified to by the Coroner (R. 71-74) and as they appear from the latter's inquest and verdict (R. 7-8), that deceased was run over or crushed (R. 73) by an engine in Respondent's Highland yards in Baltimore City, sometime shortly after 5:18 P. M. and before 6:30 P. M., on November 21, 1937, and died almost immediately thereafter. Because of the lack of eye witnesses the evidence bearing upon the cause and occurrence of the fatal accident was wholly circumstantial, and, for the added reasons that the events and deceased's activities and movements preceding the happening of the accident occurred while he was working with the crew of one of Respondent's freight trains, and that the accident occurred at an isolated point in Respondent's Highland yards, no testimony as to the preceding events or the accident itself, and no testimony of any of Respondent's activities or those of its instrumentalities involved, was available to Petitioner except that obtainable from deceased's fellow workmen and other employees of Respondent.

On the day of the accident deceased was working as a brakeman with a freight train crew consisting of a conductor (Hudson), engineman (Lambie), fireman (Morgan) and flagman (Arnold). All but the flagman, who appeared only at the Coroner's inquest, testified in the case, the conductor being called as a witness by Respondent, and the engineman and fireman testifying at the request of Petitioner. The evidence is conflicting as to whether these men, except for the trip of November 21, operated regularly as a crew, the conductor testifying (R. 29) that he had been with the crew for a month and that deceased had worked with him for that length of time, the engineman testifying (R. 58) that they had no regular crew, that sometimes deceased worked with him only at intervals of several weeks, and that they make up a train crew for each round trip out of Baltimore, and the fireman

testifying (R. 80) that he works "extra list" and that the trip in question was the only one he made with the so-called crew.

The entire group had, on November 20, the day before the accident, left Baltimore and gone to Enola, Pennsylvania, which is across the Susquehanna River and about five miles from Harrisburg, Pennsylvania (R. 10, 31, 32). At 3:30 A. M. on November 21 the group, which was resting in a bunk house at Enola (R. 32), was awakened and orally directed to go to Harrisburg (R. 10). The men procured, at Enola, engine No. 6733 and tender and a caboose in which they left Enola at 4:15 A. M. (R. 36, 37) and went to Harrisburg where the same engine, tender and caboose were coupled to a train of sixty-three cars of ore (R. 32) destined for the Canton ore piers in Baltimore, and consigned to the Bethlehem Steel Company at Sparrows Point, Maryland (R. 10, 34). This train was an "extra train" or an "extra made-up train", and, as distinguished from a "booked train", had no regular schedule and no fixed or regular times for beginning or terminating its run (R. 36), nor did the men in the group have any fixed or regular shift or time for working on the train (R. 31, 34).

In order to show the origin and destination of the ore cars, about which there is no dispute, Respondent offered in evidence a copy of the wheel report (Employer's Exhibit No. 1, R. 13-18), which shows that the train was an "extra"; twelve of the sixty-three waybills (Employer's Exhibit No. 2, R. 20-28), which establish that the ore cars were to be delivered by Respondent to the Canton ore piers and were consigned to the Bethlehem Steel Company at Sparrows Point, Maryland; photostatic copy of the remainder of the waybills, which Respondent, although requested to do so (R. 58, 97), failed to produce before the Commission and did not include in the record; the engineman's time sheet (Defendant's Exhibit C, R. 99-102); and the conductor's time sheet (Defendant's Exhibit D, R. 104-108). Petitioner requested Respondent at the hearing

before the Commission to produce the time cards (R. 79), which Respondent declined to do until the hearing in the Superior Court on appeal from the Commission, and which Respondent did not include in the record.

The train, with deceased acting as front brakeman, left Harrisburg at 7:20 A. M. on November 21 and, after dropping one ore car which had developed trouble (R. 34, 39, 59), passed, but did not stop at (R. 37, 41, 42), the first Baltimore station, Bay View yards, at 4:10 (R. 38, 60) or 4:20 P. M. (R. 10, 37) on the same day (R. 10). The first stop in Baltimore was at approximately 4:35 (R. 60) or 4:45 P. M. (R. 43) in Highland yards, which are stated to be about a half-mile (R. 10) to a mile (R. 42, 81) beyond Bay View yards; and the ultimate stop of deceased and his group in Baltimore, where, pursuant to specific orders, engine No. 6733 and its tender were uncoupled from the ore train (R. 10), was in Canton yards which are a half-mile (R. 10, 44) beyond Highland yards. The Canton ore piers, to which the ore train was hauled from Canton yards by a yard engine under the supervision of a yard crew (R. 11), are one mile (R. 10) beyond the Canton yards.

When the ore train made its first stop in Highland yards the conductor already had specific orders (R. 10, 33, 34, 41, 42, 45) which he had received in Harrisburg, and received further orders from the Highland yardmaster (R. 41, 52, 59, 78, 86, 88), that they were to haul the ore train on No. 1 track (R. 43, 61) only "to the head of the Canton yards to get our engine loose on account of it being too big to get down to the ore pier, and the yard engine handled the train from the yard at Canton to the ore pier" (R. 10, 41, 42, 43, 44, 69). The caboose was cut from the train in Highland yards and there placed upon a spur track, and the conductor and flagman remained there (R. 46) with the caboose while the engineman, fireman and deceased went on with the train to Canton yards (R. 45), the latter's duty being to uncouple the road engine and tender from the train at Canton yards (R. 10). Upon arriving at Can-

ton yards at about 5:15 P. M. (R. 43, 44) the road engine and tender were uncoupled from the ore train (R. 44, 69) which was taken completely in hand by the yard engine and crew and hauled the remaining distance to its destination at the Canton ore piers (R. 11, 44), while the road engine and tender were backed in reverse to Highland yards (R. 44, 45) after having been switched to No. 2 track. The road engine and tender started the backing movement from Canton yards on No. 2 track (R. 50, 53, 66), with the tender in the lead, at approximately 5:18 P. M. (R. 8, 45), although there is considerable conflict as to the exact amount of elapsed time, and prior to the start of the backing movement was the last time deceased was ever seen alive. He was known to have delivered the waybills for the ore cars to the yardmaster at Canton yards (R. 78, 79), and was seen to throw a switch in said yards, and then to climb upon the rear step of the tender and walk across the end sill to a ladder that leads from the back of the tender to the brakeman's cabin or "dog house" in the tender (R. 8, 65, 66, 80, 81). When the engine and tender reached Highland yards on the return trip they were recoupled to the caboose (R. 53, 66) and then, still in reverse, with the tender in the lead (R. 67), continued the return trip, after being switched on to the south track (R. 48, 66, 81), to the Bay View yards (R. 87).

There is conflicting testimony as to when deceased was first missed, the conductor first testifying that they missed him when the engine and tender backed into Highland yards from Canton yards (R. 47), and then stating (R. 49, 53) that they missed him when they reached Bay View yards, and finally denying (R. 55) that deceased had been missed before arriving back at Bay View yards. The first report that deceased was missing and inquiry as to his whereabouts (R. 67) were made after the engine, tender and caboose came into Bay View yards (R. 49) at about 6:10 P. M. (R. 54), at which time a mark and some hair and blood were found on the rear or end brake beam of

the tender (R. 53, 68, 84), after which the remaining members of the group accompanied by a yardmaster, in an effort to locate deceased, started to go back with the engine and tender over the route they had traversed from Canton yards (R. 49). Reaching Highland yards on this return trip they brought the engine to a stop and, while walking ahead, found the body of deceased between the rails of No. 2 track in said yards (R. 49, 50, 88) at a point estimated from one hundred and seventy feet (R. 56, 87) to two hundred and fifty feet (R. 56) south of the place where the caboose had been cut off and placed on the spur, and about seven or eight car lengths (R. 68) or four hundred feet (R. 83) from the Highland yardmaster's station. Deceased's cap and a cushion from the brakeman's cabin were found about forty-five feet south of his body (R. 72), and fuses and his gloves were found close by (R. 77).

After the body was found the yardmaster took charge of the situation and the engine and tender were returned to Bay View yards at 6:30 P. M. (R. 34, 37, 38, 54) where the caboose was, pursuant to previous orders, placed on the cabin track, and the engine and tender, likewise pursuant to orders, placed on the storage track (R. 82) at the ash pit in Orangeville (R. 11, 109), which is approximately one-quarter of a mile from Bay View yards (R. 54).

At the trial in the Superior Court Respondent's counsel read to the jury (R. 93-95) certain of Respondent's rules to show the general duties of its employees, and there is testimony as to said rules (R. 48, 88-90, 92-95, 143) brought out upon cross-examination of Respondent's employees in a fruitless effort of Petitioner to ascertain whether there was a written rule applicable to the duties of deceased at the time of his injuries. There also was testimony (R. 88, 89, 91, 92) from which it was attempted to be ascertained whether Respondent's crews leave their duties as a unit, and as to the duties of train and engine crews generally (R. 140-142), but such evidence as was adduced from all